NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

FARAMARZ AGHAZADEH et al., Plaintiffs and Appellants, v. WILLIAM LYONS AND ASSOCIATES, INC. et al., Defendants and Respondents.	C060685 (Super. Ct. No. 07AS02061)

Approximately two and one-half weeks after purchasing a gas station and minimart (the property) from sellers Ravez and Leanna Khan, buyers Faramarz and Laura Aghazadeh filed this action to rescind the agreement and to recover damages for fraud and negligent misrepresentation. Despite the fact that Mr. Aghazadeh spent “a lot of hours” at the gas station/minimart with Mr. Khan “getting to know . . . the real numbers” prior to the close of escrow, the complaint was based on allegations the Khans had overstated revenues, understated the business’s criminal history, misrepresented that the location was approved for a Subway sandwich shop, and misrepresented that they saw no impediment to obtaining a license to sell beer and wine. The Aghazadehs later amended their complaint to add as defendants real estate agent Steve Pop and his employer/broker, William L. Lyon & Associates, Inc. (Lyon).[1]

The trial court granted the summary judgment motions of the Khans and Pop and Lyon. As to the Khans's motion, the trial court found that the allegations against them were based on the contention that they made misrepresentations to the Aghazadehs which caused them to agree to the purchase. The trial court found that because the Aghazadehs worked with the Khans's bookkeeper, were provided financial statements, and spent time at the business verifying the business's income, they could not prove the reasonable reliance required to satisfy a cause of action for fraud or negligent misrepresentation.

Because the purchase and sale agreement pursuant to which Pop had acted as a dual agent for the buyer and seller expired, and the purchase was completed under a subsequent agreement in which neither party was represented by a real estate agent, the trial court found there was no agency relationship, thus Lyon and Pop owed no fiduciary duty to the Aghazadehs.

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1 The cross-complaints of Lyon and the Khans are not involved in this appeal.

We agree with the trial court, and shall affirm the summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On June 2, 2006, Mr. Khan, as owner, entered into an exclusive listing agreement authorizing Pop to sell the property for $2.595 million, excluding inventory and gasoline. The listing agreement provided that Pop would be entitled to a commission if he procured a buyer who offered to acquire the property on terms acceptable to Khan during the listing period or any extension thereof. The listing agreement expired on September 2, 2006.

Khan entered into two subsequent listing agreements with Pop, the last of which was entered into on September 8, 2006, and expired on October 8, 2006. The final listing agreement set the price at $2.499 million, and again provided that Pop would be entitled to a commission if he procured a buyer who offered to acquire the property on terms acceptable to Khan during the listing period or any extension thereof.

The Aghazadehs became aware of the property in late September 2006, through an internet advertisement Pop had posted. As is relevant, the ad stated "approval for deli or subway [is] also available for more income" and "100k+ gallons per month, and going up." Pop sent the Aghazadehs an email on October 3, 2006. The relevant portions of the email indicated:

> "The service station has also been approved for a deli or Subway franchise and counters have been set up with this in mind

> for future use. At this time the seller has not pursued a beer and wine license because of his religious beliefs, but this could be another way to increase profit margins. . . . At this time they sell approx. 100k+ gallons of fuel each month at a profit margin of 16-18 cents per gallon and the number of gallons sold per month is steadily increasing. . . . The minimart brings in approx. 50k in sales per month."

On October 5, 2007, the Aghazadehs met with Mr. Khan and Pop. Mr. Khan told the Aghazadehs that the minimart made $55,000 per month, $40,000 of which was on paper, and $15,000 of which was in cash (off the books). Mr. Kahn told the Aghazadehs that the gas station sold 95,000-100,000 gallons of gasoline per month.

The Aghazadehs were given a flyer at the meeting. The flyer stated in relevant part: "approved for deli and/or Subway." The Aghazadehs had seen that the minimart had a counter area, and Pop and Mr. Khan told them that they could add a sandwich shop or Subway to increase profits.

Also at the meeting, Pop told them they could increase profits by selling beer and wine. Mr. Khan indicated he had not obtained a beer and wine license because of his religious beliefs, but that it would be no problem to add one.

The day of the meeting, the Aghazadehs made an offer to purchase the property for $2.3 million. After some negotiation, the parties agreed to a purchase price of $2.4 million.

The purchase agreement, dated October 5, 2006 (original purchase agreement), stated that escrow would close in 45 days, or November 19, 2006. The original purchase agreement was contingent on the Aghazadehs obtaining a loan in the amount of $1.5 million. The initial deposit was $100,000. The agreement was also made contingent upon the property appraising at no less than the purchase price. The original purchase agreement specifically acknowledged that Pop and Lyon were acting as agent for both the buyer and seller. The original purchase agreement also specifically excluded from the sale the gasoline and merchandise in the minimart. Because no merchandise was included in the sale, no bulk transfer was involved.

As of December 15, 2006, Mr. Aghazadeh had spent many hours at the station getting to know Mr. Khan and "the real numbers." The Aghazadehs submitted a "Business Plan" to potential lenders that stated in part: "For the last six months [Mr. Aghazadeh] has been working alongside the current owner of the Land Park Valero Station and Minimart that is the subject of this business plan. His experience at Land Park has given him the opportunity to run the business himself, verify the stated income, and see, 'first hand,' potential areas for improvement."

The Aghazadehs received daily sales numbers from the Khans. In late October 2006, the Aghazadehs received a nine month income statement, covering January through September 2006. The statement showed the most gasoline sold in one month during that period was 80,617 gallons. The largest gross sales from the minimart during that period was $39,078. Thus, the Aghazadehs knew before the close of escrow that the volume of gasoline sales was not the 100,000 gallon amount previously represented, but was closer to 80,000 gallons per month. They were happy with that figure. The nine month income report also disclosed that the minimart was not bringing in sales of $55,000 per month. The Aghazadehs discussed the nine month income statement with the Khans's accountant, Mike DeFord, who confirmed that the station was making $20,000 per month after expenses. Around the same time, the Aghazadehs received the 2005 tax returns for the business. The 2005 tax return indicated the business had a net loss of $19,027.

On November 3, 2006, the Aghazadehs signed a contingency removal, pursuant to which they removed all contingencies in the original purchase agreement. At the time the contingencies were removed, the Aghazadehs had not yet obtained a loan and the property had not yet been appraised. Pop explained to them that the deposit became nonrefundable with the signing of the contingency removal.

The Aghazadehs contacted several mortgage brokers in an attempt to get financing. They had trouble getting financing because the lenders told them the business was not making enough money and was not worth the purchase price. The Aghazadehs decided to go forward with the deal because of the cash Mr. Kahn claimed he was making under the table.

Pop never made any representations to the Aghazadehs regarding crimes at the property, and the Aghazadehs never asked him about crimes. The Aghazadehs never asked Pop what would be necessary to put in a Subway sandwich franchise. The Aghazadehs never asked Pop what would be required to obtain a license to sell beer and wine.

The parties agreed to extend the close of escrow in the original purchase agreement to February 28, 2007. At the same time, the sales price was renegotiated from $2.4 million to $2.2 million. As of February 28, 2007, the Aghazadehs had not yet secured financing. Mr. Aghazadeh, Mr. Khan, and Pop were all at the station when Mr. Khan announced the contract was over.

Mr. Aghazadeh and Mr. Khan continued to negotiate for the sale of the property without involving Pop. Khan told the escrow officer that they were moving forward with the transaction without Pop. The parties entered into a new purchase agreement (new purchase agreement) that indicated it was a private sale, and that no real estate agent was involved. The purchase price remained at $2.2 million, but the price under the new contract included gasoline and merchandise. Mr. Aghazadeh understood that Khan did not intend to pay Pop a commission.

Pop learned the sale was going through without him the Friday before escrow was to close on Monday. Lyon demanded its commission due under the listing agreement. Mr. Aghazadeh and Mr. Khan threatened Pop for having submitted an escrow demand for the commission. They consulted a lawyer to see if they could avoid paying the commission, but were told Lyon was entitled to the commission. Escrow closed on April 16, 2007, and Lyon was paid its commission of $88,000. The Aghazadehs brought this action on May 4, 2007.

DISCUSSION

I

Judgment in Favor of Khans

All three causes of action alleged against the Khans (rescission, fraud, and negligent misrepresentation) are based upon the Aghazadehs's claim that the Khans's fraudulent or negligent misrepresentations induced them to purchase the property. Specifically, those misrepresentations were that: (1) the location had been approved for a deli and/or Subway, (2) the business sold 100,000 gallons of gasoline per month, (3) the minimart had sales of $50,000 per month, (4) the business had not experienced any significant criminal activity in the preceding 12 months, and (5) there was no impediment to obtaining a license to sell beer and wine in the minimart.

The Khans's answer alleged as an affirmative defense that there was no justifiable reliance on any purported misrepresentation. Justifiable reliance is an element of a cause of action for fraud, as well as a cause of action for negligent misrepresentation. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638; *Residential Capital v. Cal-Western Reconveyance Corp.* (2003) 108 Cal.App.4th 807, 827.) A defendant is entitled to summary judgment if it shows one or more elements of each cause of action cannot be established, or by establishing an affirmative defense. (*Sacramento County*

Deputy Sheriffs' Assn. v. County of Sacramento (1996) 51 Cal.App.4th 1468, 1476.) Thus, the Khans were entitled to summary judgment if they showed there was no justifiable reliance.

It was undisputed that the Aghazadehs knew prior to entering into the new purchase agreement that the monthly volume of gasoline sales was below 100,000 gallons, that the nine month income statement for the first nine months of 2006 indicated a monthly sales volume from the minimart that was below $50,000, and that the 2005 tax return indicated the business suffered a net loss. There was conclusive evidence that Mr. Aghazadeh spent months working alongside Mr. Khan getting to know "the real numbers." It was undisputed that potential lenders told the Aghazadehs that the business was not worth the amount they were paying.

In light of these facts, the Aghazadehs could not establish that they reasonably relied on the Khans's representations regarding the amount of sales or the worth of the business. Moreover, "[t]he rule is universally recognized in fraud cases that where the buyer is aware of suspicious circumstances or has learned of the falsity of one or more of the representations he is under a legal duty to make a complete investigation and may not rely upon the statements of the seller." (*Carpenter v. Hamilton* (1936) 18 Cal.App.2d 69, 75-76.) Thus, they cannot claim to have reasonably relied on the Khans's representations regarding a Subway approval, a beer and wine license, or the amount of significant criminal activity at the premises. All of these matters were readily ascertainable from a reasonable investigation.

Because the Aghazadehs's rescission cause of action (which is not actually a cause of action, but a remedy) is based upon fraud and misrepresentation, it necessarily fails as well. (*Nakash v. Superior Court* (1987) 196 Cal.App.3d 59, 70 ["Rescission is *not* a cause of action; it is a remedy."].)

The Aghazadehs argue their justifiable reliance at the inception of the original purchase agreement is sufficient to support recovery for fraud, citing *Jue v. Smiser* (1994) 23 Cal.App.4th 312. In that case, the buyers of a home learned before escrow closed that the house might not have been designed by a famous architect, as it had been advertised. (*Id.* at p. 314.) The court held that reliance at the time the contract is initially made is sufficient to maintain an action for damages, and the claimant need not establish continuing reliance until the contract is fully executed. (*Id.* at pp. 317-318.)

Here, however, the relevant contract is the new purchase agreement. That is the agreement that was fully executed. That is the agreement by which the Aghazadehs acquired the property that they now claim to have suffered damages from purchasing. They entered into that agreement freely, and with the knowledge acquired from the investigations they performed under the original purchase agreement. Therefore, unlike the buyers in *Jue v. Smiser*, *supra*, the Aghazadehs cannot claim to have reasonably relied on the misrepresentations from the inception of the contract which is the basis of their claims.

II
Judgment in Favor of Lyon and Pop

The trial court concluded that the Aghazadehs could not demonstrate the existence of an agency relationship with Lyon and Pop when the new purchase agreement was executed. In the absence of an agency relationship, no cause of action for breach of fiduciary duty could be maintained, and no facts could be established to support the causes of action for fraud and negligent misrepresentation. We agree.

The agency relationship between Lyon and Pop on the one hand and the Aghazadehs on the other was controlled by the original purchase agreement. That agreement provided that Lyon (and Pop) were acting as the selling agent for both the seller and buyer "for this transaction." The agreement provided that escrow was to close within 45 days, and that time was of the essence. It was undisputed that escrow did not close within 45 days. The Aghazadehs understood that if escrow did not close by February 28, 2007, the deal was over.

An agency is terminated by the expiration of its term. (Civ. Code, § 2355, subd. (a).) Here, the agency relationship was for the transaction described in the original purchase agreement, and when the agreement expired, so did the agency relationship. When the Khans and Aghazadehs entered into the new purchase agreement, the express terms of that agreement denied any agency relationship for the purposes of that transaction. All of the Aghazadehs’s claims of damage stem from the purchase of the property, thus from the transaction represented by the new purchase agreement.

The complaint alleges that Pop and Lyon owed the Aghazadehs “a fiduciary duty to make the fullest disclosure of all material facts that might affect Plaintiffs’ interest in entering into the transaction to purchase the Property.” Because there was no agency relationship for the transaction whereby the Aghazadehs purchased the property, the claim of breach of fiduciary duty fails as a matter of law.

The Aghazadehs's other claims of breach are that Pop did not tell them that he had not independently verified the sales figures and other information he gave them about the property, that he did not disclose that the equipment was secured by a UCC-1 filing, that he did not have the property appraised, that he did not inform them they should conduct a bulk sale escrow, that he did not assist them in obtaining the necessary financial information, and that Lyon did not reasonably supervise Pop.

These claims further demonstrate why Lyon and Pop cannot be held as fiduciaries for a transaction in which they were not involved. Since the equipment was not included in the original purchase agreement, there was no reason for Pop to disclose any lien on the equipment in the original purchase. Likewise, no bulk sale escrow would have been appropriate in the original transaction. Lyon and Pop had no duty to disclose with regard to the new purchase agreement. Both the original purchase agreement and the new purchase agreement provided that the buyers would pay for an appraisal, and that the broker was not responsible for deciding what price the buyer would pay or the seller would accept.

The Aghazadehs argue that for purposes of their fraud and misrepresentation causes of action they were not required to show their reliance was justified, since they had the right to rely on representations of a fiduciary without the duty of further inquiry. However, as explained above, they cannot claim Lyon or Pop was acting as their fiduciary when they entered into the new purchase agreement. Since they were aware of the falsity of some representations made to them prior to and during the course of the original purchase agreement, they cannot claim their reasonable reliance on these prior statements induced them to enter into the new purchase agreement.

The Aghazadehs claim Pop continued to assist them in obtaining financing even after February 28, 2007. Consequently, they claim Pop continued to act on their behalf and to owe them a fiduciary duty. Even if Pop continued to perform services for the Aghazadehs after the termination of the original purchase agreement, it is undisputed that the agency was defined by the original purchase agreement as being for that transaction, and that when that transaction was declared over, there was no similar agency for the new purchase agreement. Pop was not aware of the new purchase agreement until three days before escrow closed, and did not learn of the agreement from the Aghazadehs. Under these circumstances, any fiduciary duty was tied to the contract creating the agency. When that contract ended, so did the fiduciary relationship, and Lyon and Pop had no further fiduciary duties to the Aghazadehs.

The fact that Lyon was paid a commission is not determinative. Lyon's entitlement to a commission was based on the terms of its listing agreement with Khan, and not on the terms of either purchase agreement.

The Aghazadehs argue for the first time in their opening appellate brief that the new purchase agreement was void as an adhesion contract. There were no allegations in the complaint that the contract was void because it was unconscionable or because it was an adhesion contract. The pleadings delimit the scope of the issues in a motion for summary judgment. (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381.) For this reason the Aghazadehs may not raise unpled issues in opposition to the summary judgment motion. The only issues that need be addressed by a summary judgment motion are those issues framed by the pleadings. If the Aghazadehs wanted to allege the contract was one of adhesion, they should have sought leave to add such an allegation before the hearing on the summary judgment motion. (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264-1265.)

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

ROBIE, J.